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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS FRANK ARMOGIDA,

Defendant and Appellant.

B208297

(Los Angeles County
Super. Ct. Nos. PA060727 &
GA070974)

APPEAL from judgments of the Superior Court of Los Angeles County,
Ronald S. Coen, Judge. Affirmed.

Alan Mason for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Assistant
Attorney General, Lance E. Winters and Michael A. Katz, Deputy Attorneys
General for Plaintiff and Respondent.

I.

INTRODUCTION

In the present matter, Case No. PA060727, defendant and appellant Nicholas Frank Armogida was convicted of possession of methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a). He was sentenced to three years in prison. Additionally, appellant's probation in another matter (Case No. GA070974) was revoked and he was sentenced to a prison term of two years, to run concurrently with the sentence in Case No. PA060727.

Appellant contends that (1) we should independently review the *Pitchess*¹ records to determine if the trial court failed to disclose discoverable items; (2) the prosecutor committed misconduct during rebuttal; (3) the trial court abused its discretion in denying his request for Proposition 36 probation²; and (4) the trial court erred in revoking his probation in Case No. GA070974.

We hold that (1) the trial court did not fail to order disclosure of discoverable items; (2) the prosecutor did not commit misconduct; (3) the trial court did not abuse its discretion in denying appellant's request for Proposition 36 probation because the record shows that he had "participated" in two separate courses of treatment pursuant to Penal Code section 1210.1; and (4) the trial court did not err in revoking his probation (Pen. Code, § 1210.1, subd. (e)(3)(A)) in Case No. GA070974 because appellant was given all the procedural safeguards of a *motion*, i.e., notice and an opportunity to be heard and he acquiesced in the procedures utilized.

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

² Proposition 36 is the Substance Abuse and Crime Prevention Act of 2000. The Act is largely codified at Penal Code sections 1210, 1210.1 and 3063.1, and division 10.8 (commencing with § 11999.4 of the Health and Safety Code). It was adopted at the November 7, 2000 General Election. It took effect on July 1, 2001. (*People v. Hazle* (2007) 157 Cal.App.4th 567, 572; *People v. Esparza* (2003) 107 Cal.App.4th 691, 693.)

We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts.*

1. *Appellant's prior convictions.*

In Case No. BA299453, appellant pled guilty on May 19, 2006 to one count of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The trial court placed him on three years formal probation at a Proposition 36 program on certain conditions. On March 28, 2007, the court terminated appellant's probation. On April 9, 2007, the trial court reinstated the probation on the same terms and conditions.

In Case No. GA070974, appellant pled guilty on December 3, 2007, to charges that on September 18, 2007, he unlawfully possessed methoxy-diisopropyltryptamine (ecstasy), in violation of Health and Safety Code section 11377, subdivision (a). The trial court referenced the probation report when it placed appellant on probation for three years, under the terms and conditions of Proposition 36. As part of his sentence, appellant was to cooperate with his probation officer in a plan for substance abuse counseling determined by the Community Assessment Service Center. At the time of sentencing, appellant informed the trial court that he was just "finishing up" the Proposition 36 program in Case No. BA299453. On February 25, 2008, the trial court revoked appellant's probation in Case No. GA070974 and terminated his Proposition 36 program. About two months later, in April 2008, the court set the probation violation hearing to trail the sentencing with regard to the present conviction in Case No. PA060727. On May 19, 2008, the trial court elected not to reinstate probation in Case No. GA070974. Appellant was sentenced to the midterm of two years, which was to run concurrent to the sentence in Case No. PA060727.

2. *The facts of the present conviction, Case No. PA060727.*

On the evening of January 11, 2008, six Los Angeles police officers and one probation officer went to a house on Beachy Avenue in Los Angeles to conduct a probation search. When one officer knocked on the door, another saw appellant grab his waistband, walk into the kitchen, and throw into the trash his black cellular telephone, a small digital scale, and clear plastic bindle containing 4.34 grams of methamphetamine, which is a usable amount of methamphetamine. Appellant left the house through the back door, turned and then reached into a speaker box, where he placed a methamphetamine pipe. After he was detained appellant said that the “dope” was not his.

The above facts were proven by the following testimony from officers who went to the home to conduct the probation search. Officer Nelson Jatiko knocked at the front door and announced a search. When a female opened the door, Officer Jatiko saw appellant turn and walk toward the kitchen area. Meanwhile, Officer Luke Walden was stationed outside the home. Through windows, Officer Walden saw appellant reach for his waistband and then walk through the dining room into the kitchen. Officer Walden saw appellant throw two black objects and a golf-sized plastic object into a trash can. Officer Walden saw appellant walk to the rear of the house. Officer Walden radioed other officers that appellant was “tossing the dope.” Officer Cesar Flores saw appellant exit the rear door of the house, turn and then reach into a speaker box. Officer Flores illuminated appellant with a flashlight and then instructed appellant to put up his hands. Officer Flores found a glass pipe used to smoke methamphetamine inside the speaker box.

A few minutes later, Officer Walden and Officer Manuel Esqueda found a small digital scale, methamphetamine, and a black cellular telephone, which Officer Esqueda determined belonged to “Nick.” Appellant was read his *Miranda*

rights.³ Appellant told Officer Walden that the “dope” was not his. After being booked, appellant asked for his cellular telephone.

A physical and chemical analysis conducted by Edgardo Eugenio revealed the substance inside the baggie was 4.34 grams of methamphetamine.

3. *Procedure in the present conviction, Case No. PA060727.*

On February 5, 2008, prior to the filing of the information, a probation officer prepared a report. The probation officer recommended, should appellant be convicted as charged, that appellant be found in violation of probation in Case Nos. BA299453 and GA070974, that probation in those cases be revoked or remain revoked, and that appellant be sentenced to prison. (Pen. Code, § 1203, subd. (e)(4).)

On February 8, 2008, appellant was charged by information with possession of methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a). On May 16, 2008, appellant was convicted by a jury as charged.

At the sentencing hearing on May 19, 2008, appellant’s counsel informed the court it was his understanding that appellant had completed the Proposition 36 program in Case No. BA299453.⁴ The trial court noted it had read and considered the probation officer’s report. Appellant and his wife both made statements to the trial court, arguing that appellant should not be sentenced to prison. The trial court found appellant not amenable to Proposition 36 treatment because he was on two separate grants of Proposition 36 probation. The court sentenced appellant in Case No. PA060727 to three years in state prison and assessed a number of fines. As discussed above, in Case No. GA070974, the trial court revoked appellant’s

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ Defense counsel stated in part, “Mr. Armodiga initially in the B.A. case had, as I understand, successfully completed the Prop 36 program, and was waiting to go back to court for the formal discharge of the case [when] a urine sample . . . came up positive.”

probation, and sentenced him to two years in prison, which was to run concurrently with the sentence in Case No. PA060727.

Appellant appealed.

III.

DISCUSSION

A. We have independently reviewed the Pitchess records and have concluded that the trial court did not fail to order disclosure of discoverable items.

Before trial, appellant filed a motion seeking discovery of peace officer personnel records pursuant to *Pitchess v. Superior Court, supra*, 11 Cal.3d 531. Appellant sought material related to coercive and improper conduct, false statements and police reports, and other evidence of misconduct amounting to moral turpitude. The trial court found good cause for an in camera review. The trial court conducted an in camera review of the officers' records and determined that some discoverable material existed and ordered disclosure.

On appeal, appellant requests that we review the sealed records of the trial court's *Pitchess* review to determine whether the trial court abused its discretion by failing to order additional disclosure of information.

Trial courts are vested with discretion when ruling on motions to discover peace officer records, which we review for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Mooc* (2001) 26 Cal.4th 1216, 1228.) We independently have reviewed the sealed transcript of the April 15, 2008, in camera hearing. This transcript constitutes an adequate record of the trial court's review of documents provided to it, and reveals no abuse of discretion.

B. The prosecutor did not commit misconduct during rebuttal.

Appellant contends the prosecutor committed misconduct during rebuttal. Appellant argues the prosecutor impermissibly insinuated that defense counsel was putting on a fabricated defense. This contention is not persuasive.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. 'A prosecutor's . . . intemperate behavior

violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]” (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.)

Prosecutors may focus on the deficiencies in the defense case and the attempt by the defense to dilute the persuasiveness of the prosecution case. “[A] prosecutor is free to give his [or her] opinion on the state of the evidence, and in arguing [the] case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses. [Citations.]” (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Also, prosecutors may use colorful language to criticize defense counsel’s tactical approach when the language is not a personal attack on defense counsel’s integrity. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.) Thus, for example, in *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781, the court concluded it was permissible to argue that defense counsel attempted to “ ‘obscure the truth’ and confuse and distract the jury in order ‘to manufacture doubt even where none exist[ed].’ ” Another example of where the prosecutor did not commit misconduct was where the prosecutor told jurors they should “avoid ‘fall[ing]’ for [defense] counsel’s argument . . . , to view counsel’s argument as a ‘ridiculous’

attempt to allow defendant to ‘walk’ free, to view counsel’s statement as an ‘outrageous’ attempt to demean the victim and treat her as a ‘Jane Doe,’ and to view counsel’s argument as a ‘legal smoke screen.’ ” (*People v. Stitely, supra*, at p. 559, fn. omitted.) Similarly, the Supreme Court held that there was no misconduct when a prosecutor argued that “ ‘any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something’ ” (*People v. Medina* (1995) 11 Cal.4th 694, 759.)

In contrast, there is prosecutorial misconduct for a prosecutor “to suggest to the jury in arguing the veracity of a witness that the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt.” (*People v. Padilla, supra*, 11 Cal.4th at p. 946.) Prosecutors also may not insinuate that defense counsel fabricated evidence or factually deceived the jury (*People v. Stitely, supra*, 35 Cal.4th at p. 560), thereby maligning defense counsel’s character. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1076-1077.) Prosecutors may not “ ‘engage in rude or intemperate behavior, even in response to provocation by opposing counsel, [as such behavior] greatly demean[s] the office they hold and the People in whose name they serve.’ [Citation.]” (*People v. Herring, supra*, at p. 1076.) Thus, the following argument in *People v. Herring* was misconduct as it was intemperate, undignified, and cast aspersions on defense counsel’s character and integrity, and suggested defense counsel suborned perjury: “ ‘[m]y people are victims. [Defense counsel’s people are victims.] His people are rapists, murderers, robbers, child molesters. . . . He has to help them plan a defense. He does not want you to hear the truth.’ ” (*Id.* at p. 1075.)

Here, the alleged misconduct occurred in the prosecutor’s rebuttal. At the time, the prosecutor disputed defense counsel’s argument that if there was conflicting evidence, then there must be reasonable doubt. The prosecutor then asked the jury to consider the prosecution evidence, which if believed, would mean that the defense was not credible. Then, the prosecutor stated: “Now, the defense lawyer did parade a lot of witnesses up here for the defense case. And the

thing is, the defense lawyer also mentioned, well, if you hear a reasonable explanation for what happened pointing to his innocence, then you must acquit, and that's absolutely true, and that is definitely what you should do if you heard a reasonable explanation as to what happened. [¶] . . . [¶] And what the defense attorney did was, he went and picked the best ones that sounded good for his client and said, well, this is the reasonable explanation of what happened, leaving out all the bad stuff.” Defense counsel’s objection was overruled.

Contrary to appellant’s argument, the prosecutor’s rebuttal argument was fair comment on the evidence, including reasonable inferences or deductions drawn therefrom. (*People v. Hill, supra*, 17 Cal.4th at p. 819.) The comments were merely about the quality of the defense case and the persuasiveness of defense counsel’s argument, focusing on deficiencies. The prosecutor suggested that in argument defense counsel selectively omitted much of the evidence in an attempt to have the jury ignore the strong evidence presented against appellant. The presentation also suggested that the defense witnesses were not believable. However, the prosecutor did not assert that there was other, undisclosed evidence bearing on the case. Nor did the prosecutor use language that was intemperate, undignified, or that cast aspersions on defense counsel’s character and integrity. The prosecutor did not insinuate that defense counsel was putting on a fabricated defense. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154-1155 disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [no misconduct where prosecutor told the jury that defense counsel’s argument was a “ ‘lawyer’s game’ and an attempt to confuse the jury by taking the witness’s statement out of context”].) Thus, there was no prosecutorial misconduct.

In any event, the comments at issue were brief, mild, and isolated. They did not constitute either the type of egregious conduct that so infects a trial as to render it unfair under the federal Constitution. The prosecutor’s argument did not use deceptive or reprehensible methods to attempt to persuade either the court or the jury so as to violate the state Constitution. (*People v. Espinoza* (1992) 3

Cal.4th 806, 820.) Moreover, prosecution presented a strong case. Prosecution witnesses were consistent and clear, and their testimony corroborated.

Additionally, the trial court instructed the jury, that “[n]othing that the attorneys say is evidence.” We presume the jury followed those instructions. (*People v. Pinholster* (1992) 1 Cal.4th 865, 925.)

The rebuttal argument by the prosecutor does not warrant reversal.

C. The trial court did not abuse its discretion in denying appellant’s request for Proposition 36 probation.

Appellant contends that with regard to Case No. PA060727, the trial court abused its discretion in denying him probation under Proposition 36 and sentencing him to prison. He argues the record does not demonstrate that he had already “participated” in two separate courses of treatment pursuant to Penal Code section 1210.1. This contention is not persuasive.

Proposition 36, the Substance Abuse and Crime Prevention Act of 2000 (the Act), was enacted to enable drug offenders the opportunity to attend community based drug treatment programs rather than being incarcerated. (*People v. Tanner* (2005) 129 Cal.App.4th 223, 231.) It ordinarily allows eligible drug users the opportunity of drug treatment and probation rather than being sent to prison. (*People v. Hazle, supra*, 157 Cal.App.4th at p. 579.) As part of this statutory scheme, Penal Code section 1210.1, subdivision (a) provides: “Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program.” Subdivision (b)(5) of Penal Code section 1210.1 states that subdivision (a) does not apply to “Any defendant who has two separate convictions for nonviolent drug possession offenses, has *participated in two separate courses of drug treatment* pursuant to subdivision (a), and is found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment”

(Pen. Code, § 1210.1, subd. (b)(5), italics added.)⁵ Thus, before a defendant is denied probation under section 1210.1, subdivision (a) the defendant has to have participated in “ ‘two separate courses of drug treatment’ [citation].” (*People v. Castagne* (2008) 166 Cal.App.4th 727, 732-733.)

Here, in Case No. BA299453, appellant pled guilty to one count of possessing methamphetamine. According to appellant’s admission before he was sentenced in Case No. GA070974 and that of his counsel before appellant was sentenced in the present case, appellant successfully completed his Proposition 36 program in Case No. BA299453. Thereafter, in Case No. GA070974, appellant pled guilty on December 3, 2007 to one count of possessing methamphetamine. At that time, appellant was sentenced to a second grant of Proposition 36 probation. Pursuant to the applicable authority, “[w]ithin seven days of an order imposing probation under subdivision (a), the probation department shall notify

⁵ In 2006, the Legislature amended Penal Code section 1210.1 by Senate Bill 1137, effective July 12, 2006. (Stats. 2006, ch. 63, § 7.) The changes to subdivisions (a) and (b)(5) are not substantive and have no significance for our discussion. The contents of subdivision (e) are now in subdivision (f). This change also has no significance to our analysis. Throughout this opinion we have cited to the former version of Penal Code section 1210.1.

In *Gardner v. Schwarzenegger* (Super. Ct. Alameda County, 2006, No. RG06278911), the superior court issued a preliminary injunction in September 2006, blocking the legislation from taking effect pending resolution of a constitutional challenge mounted against the legislation. In May 2008, the superior court granted summary judgment for plaintiffs, concluding Senate Bill 1137 violated article II, section 10(c) of the California Constitution because the new statutes were inconsistent with the purposes of the initiative enacted by the voters. (See *People v. Enriquez* (2008) 160 Cal.App.4th 230, 240, fn. 2; *People v. Hazle, supra*, 157 Cal.App.4th at p. 577, fn. 1; *People v. Hartley* (2007) 156 Cal.App.4th 859, 861, fn. 1.)

We have referred to, and quoted from, Penal Code section 1210.1 utilizing the statute in effect prior to the 2006 amendments to comply with the preliminary injunction, because the differences between the two versions of the statute are not significant for our purposes, and because the parties have not contested the imposition of the injunction, suggested it is inapplicable to this case, or raised it as an issue.

the drug treatment provider designated to provide drug treatment under subdivision (a). Within 30 days of receiving the notice, the treatment provider shall prepare a treatment plan and forward it to the probation department.” (Pen. Code, § 1210.1, subd. (c).) Thus, with regard to Case No. GA070974, presumably, appellant would have begun his treatment by the beginning of January 2008 once the treatment plan was forwarded to the probation department. It is appellant’s burden to rebut that presumption. (Evid. Code, § 664 [presumption that official duties are performed]; Evid. Code, § 606 [presumption affecting burden of proof imposes upon party against whom it operates burden to prove nonexistence of presumed fact].) To rebut the presumption, it is insufficient for appellant to simply state that there was “no evidence proves that [he] had even entered into a treatment program [by the time he was arrested for the present offense on January 11, 2008].” Appellant needed to prove the non-existence of the presumed fact. (*People v. Martinez* (2000) 22 Cal.4th 106, 125 [party opposing presumption has burden of proof].) The conclusion that appellant had begun a treatment program is buttressed by the trial court’s February 25, 2008, minute order in Case No. GA070974 stating that probation in that case was revoked and the Proposition 36 program “terminated.” Thus, the presumption is that appellant began and participated in a second Proposition 36 drug program in Case No. GA070974.

When appellant was sentenced in May 2008 in the present case (Case No. PA060727) on the charges emanating from the events of January 11, 2008, he already would have participated in two separate Proposition 36 drug programs. Therefore, appellant was unamenable to drug treatment (Pen. Code, § 1210.1, subd. (b)(5)) and the trial court did not abuse its discretion in sentencing him to prison rather than granting him probation.

D. *The trial court did not err in revoking appellant's probation on Case No. GA070974.*

At the time appellant was sentenced on the within matter, the trial court revoked his probation in Case No. GA070974. Appellant contends the trial court impermissible revoked his probation because the district attorney did not “move” to revoke the probation. This contention is not persuasive.

“Generally, a defendant who receives probation under the Act can only have that probation revoked in accordance with the terms of the statutory scheme.” [Citation.]” (*People v. Tanner, supra*, 129 Cal.App.4th at p. 234.) As part of Proposition 36, Penal Code section 1210.1, subdivision (e)(3)(A) states: “If a defendant receives probation under subdivision (a), and violates that probation either by committing a nonviolent drug possession offense . . . or by violating a drug-related condition of probation, and *the state moves* to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked.” (Italics added.)

Thus, under Proposition 36, the state is required to “move” for revocation of a defendant’s probation as a prerequisite to a court’s finding of a violation of a drug-related condition of probation. (*People v. Tanner, supra*, 129 Cal.App.4th at p. 236.) While the Act is “silent on the exact procedure by which the state is to move to revoke probation, whether it be written or oral[]” (*ibid.*), the requirements in Penal Code section 1210.1, subdivision (e)(3)(A) guarantee that before Proposition 36 probation is revoked, a defendant has to have received notice and an opportunity to respond to a revocation proposal. (Cf. *People v. Hazle, supra*, 157 Cal.App.4th at pp. 574-575.) This is consistent with the procedures utilized in a traditional probation revocation proceeding that have been presumed to apply to probation revocation under the Act. (*People v. Tanner, supra*, at p. 234.)

“As a matter of due process, a defendant facing a formal traditional probation revocation hearing is entitled to written notice of the claimed violations, disclosure of the evidence against him, opportunity to be heard and to present

evidence, the right to confront and cross-examine adverse witnesses (unless the hearing officer finds good cause for not allowing confrontation), a neutral and detached fact finder and a written statement of the evidence relied on and the reasons for revoking probation. [Citation.]” (*People v. Tanner, supra*, 129 Cal.App.4th at p. 234, citing *People v. Vickers* (1972) 8 Cal.3d 451, 457-459; *Morrissey v. Brewer* (1972) 408 U.S. 471; *Gagnon v. Scarpelli* (1973) 411 U.S. 778; *In re La Croix* (1974) 12 Cal.3d 146; see *People v. Martin* (1992) 3 Cal.App.4th 482, 486; *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 61-62.)⁶

However, in the context of traditional probation revocation, due process does not require “all the procedural safeguards of a criminal trial. [Citations.]” (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400; *People v. Dale* (1973) 36 Cal.App.3d 191, 195.) Rather, the procedures call for flexibility according to the particular situation. (*People v. Buford, supra*, 42 Cal.App.3d at p. 981.) Thus, for “example, ‘where “appropriate,” witnesses may give evidence by document, affidavit or deposition.’ [Citation.]” (*People v. Abrams, supra*, at p. 401.) Further, personal waivers of the procedures are not required. (*People v. Dale, supra*, at pp. 194-195.) Thus, a defendant’s failure to object to the procedures, and the conduct of his or her attorney, can indicate acquiescence in traditional probation revocation procedures. (*People v. Arreola* (1994) 7 Cal.4th 1144; *People v. Dale, supra*, at pp. 194-195.)

We interpret the statutory provisions in Penal Code section 1210.1, subdivision (e)(3)(A) requiring a motion as insuring that a defendant has been given the same due process protections as delineated above.

Here, there is no indication that appellant lacked adequate notice or an opportunity to be heard on any issue material to the potential disposition. The

⁶ The courts utilize the same procedures in traditional parole and probation revocation proceedings. (*People v. Vickers, supra*, 8 Cal.3d at p. 458; *People v. Buford* (1974) 42 Cal.App.3d 975, 980.)

record indicates appellant knew the trial court would be considering whether probation should be revoked in Case No. GA070974. A probation report, which is considered a court record (*County of Placer v. Superior Court* (2005) 130 Cal.App.4th 807, 812), summarized appellant's background, criminal history, and recited the probation officer's recommendation that probation be revoked. The report was submitted on February 5, 2008, before the trial court at the time appellant's probation was revoked.⁷

The probation report served as the functional equivalent of a formal motion or petition. It was before the trial court and provided appellant with written notice of the potential revocation, giving him adequate notice of the proceedings. (*People v. Tanner, supra*, 129 Cal.App.4th at p. 236, fn. 4 ["The written [Penal Code] section 1210 review/violation report filed with the court for the . . . hearing gave [defendant] notice of his numerous breaches of conditions of his probation under the Act that the state was moving to have determined as actual violations of his probation."]; *People v. Buford, supra*, 42 Cal.App.3d at p. 982 [due process satisfied when defendant served with revocation petition, after a continuance defendant was served with probation officer's new report containing same and additional grounds for revocation, defendant did not seek continuance nor argue he had not been given adequate notice].)

Additionally, appellant did not object to the procedures and there is nothing to indicate that appellant lacked adequate notice or an opportunity to be heard on any material issue. Rather, the record suggests appellant knew that the issue of

⁷ The probation report was prepared consistent with Penal Code section 1203.7, subdivision (a) which reads: "Either at the time of the arrest for a crime of any person over 16 years of age, or at the time of the plea or verdict of guilty, the probation officer of the county of the jurisdiction of the crime shall, when so directed by the court, inquire into the antecedents, character, history, family environment and offense of that person. The probation officer shall report that information to the court and file a written report in the records of the court. The report shall contain his or her recommendation for or against the release of the person on probation."

revoking his probation in Case No. GA070974 would be considered by the court as he, his wife, and his counsel all presented statements in an effort to persuade the court to keep appellant out of prison.

Therefore, not only does the record demonstrate appellant had notice that the court was going to address revocation of his probation, but appellant addressed the issue before the court and acquiesced in the procedures.

Appellant also contends the trial court could not revoke his probation in Case No. GA070974 because the court did not make a finding that appellant posed a danger to others. In making this argument, appellant points to Penal Code section 1210.1, subdivision (e)(3)(A). He reasons that since the current offense constituted his first probation violation in Case No. GA070974, the court was not allowed to revoke probation in that case unless it determined that he posed a danger to the safety of others.

However, prior to revoking appellant's probation in Case No. GA070974, the court already had sentenced him to prison on the current case. Additionally, the current offense constituted appellant's second probation violation. The court sentenced appellant to prison for that second probation violation, as was dictated under Penal Code section 1210.1, subdivision (e)(3)(B) because appellant was found unamenable to further drug treatment. Additionally, while he was in prison on the present offense, there was no practical way appellant could participate in or complete Proposition 36 probation. (*People v. Wandick* (2004) 115 Cal.App.4th 131 [defendant in prison for grand theft was unavailable to participate in Proposition 36 treatment program]; *People v. Esparza, supra*, 107 Cal.App.4th at pp. 698-699 [defendant sentenced to prison for vandalism, unavailable to Proposition 36 probation on separate drug offense].)

Therefore, the trial court did not err in revoking appellant's probation in Case No. GA070974.

IV.

DISPOSITION

The judgments in Case Nos. PA060727 and GA070974 are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.